

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION

3 THOMAS WHITAKER, et al . C.A. NO. H-13-2901
4 VS. . HOUSTON, TEXAS
5 BRAD LIVINGSTON, et al . AUGUST 18, 2015
6 . 2:00 P.M. to 3:58 P.M.

7 TRANSCRIPT of HEARING
8 BEFORE THE HONORABLE LYNN N. HUGHES
9 UNITED STATES DISTRICT JUDGE

10 APPEARANCES:

11 FOR THE PLAINTIFFS: MS. BOBBIE L. STRATTON
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25 Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

APPEARANCES CONTINUED

OFFICIAL COURT REPORTER:

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P R O C E E D I N G S

THE COURT: Thank you. Please be seated.

I let some mock trial students use the courtroom, and they adjusted my chair for short people. I'm not. And every time I sit down in it, I think about it, but then I burst from the room to go do something else and I don't think about it until I sit down in it again.

All right. Ms. Stratton --

MS. STRATTON: Yes, Your Honor.

THE COURT: -- where is Levin?

MS. STRATTON: She is in Philadelphia.

THE COURT: Why does she need to be listed as counsel?

MS. STRATTON: She was originally part of our case -- I mean, she still is counsel for these clients. She moved --

THE COURT: Has she ever met with these clients?

MS. STRATTON: I believe she has, yes, Your Honor.

THE COURT: Have you met with them?

MS. STRATTON: I have not personally met them, no.

THE COURT: Who on the team of these gentlemen has met with them?

MS. STRATTON: Ms. Levin.

THE COURT: But you're not sure about that?

MS. STRATTON: Not a hundred percent absolutely sure. We were originally retained through their habeas attorneys, who got authority from them to become our clients.

1 *THE COURT:* And who was the habeas attorney?

2 *MS. STRATTON:* All three of the original plaintiffs
3 have different lawyers. I don't know what they are -- I don't
4 know their names off the top of my head. I do have them in my
5 records.

6 *THE COURT:* You don't know, do you?

7 By "original" you mean with the Court of Criminal
8 Appeals or here?

9 *MS. STRATTON:* Oh, when we originally -- when they
10 originally retained us for this representation, it was through
11 their habeas attorneys, so their federal court lawyers.

12 *THE COURT:* Is Levin a member of the bar of this
13 Court?

14 *MS. STRATTON:* Yes, Your Honor, she is. She moved to
15 Philadelphia, I'm not sure exactly the date, but it was during
16 the pendency of this case.

17 *THE COURT:* Well, by a rough look, it's been 18 months
18 since she's done anything in this case.

19 *MS. STRATTON:* Since she's done anything?

20 *THE COURT:* Yes.

21 *MS. STRATTON:* Maybe since she signed a pleading,
22 that's possible.

23 *THE COURT:* No, she signed every pleading, because
24 we've got all 14 people on the pleadings, but I'm just not sure
25 she represents Walker and Williams.

1 *MS. STRATTON:* She does, Your Honor. I had a --

2 *THE COURT:* How do we know that?

3 *MS. STRATTON:* -- conference call with her this
4 morning about this hearing. So, yes, I know that she does.

5 *THE COURT:* Do they know that?

6 *MS. STRATTON:* Do they know that?

7 *THE COURT:* Yes, ma'am. These two fellows are not an
8 issue. They're not a statement. They're temporarily at least
9 live human beings --

10 *MS. STRATTON:* Correct.

11 *THE COURT:* -- that need to be at least comfortably
12 aware of what's being done in their name and by whom.

13 *MS. STRATTON:* I don't disagree with that, Your Honor.

14 *THE COURT:* Well --

15 *MS. STRATTON:* Those are -- that's what's required of
16 us in our rules of ethics.

17 *THE COURT:* But to your knowledge, nobody on the
18 plaintiffs' team has met in person with Walker or Williams?

19 *MS. STRATTON:* I have not. No one at Baker Donelson
20 has. I will not submit to you that that's the case. That's
21 certainly not the case. I believe that Ms. Levin has. And
22 we've been in touch with them through their habeas counsel. I
23 mean, to be frank, Your Honor, we're not -- we can't pick up
24 the phone and call them. I mean, they can't receive our phone
25 calls. And, you know, we have not gone out of our way to go to

1 their prison and visit with them about this case, no.

2 *THE COURT:* Where are they? The Walls?

3 *MS. STRATTON:* Pardon?

4 *THE COURT:* Which unit are they in?

5 *MS. STRATTON:* They're in the Huntsville Unit.

6 *MS. HOWELL:* They're in the Polunsky Unit.

7 *MS. SARGENT:* Polunsky Unit.

8 *MS. STRATTON:* Oh, okay. I apologize.

9 *THE COURT:* And where is it?

10 *MS. HOWELL:* In Livingston, Texas.

11 *MS. STRATTON:* I apologize, Your Honor.

12 *THE COURT:* No, that's all right. I used to know all
13 of them, but they keep building them.

14 Do you know where Livingston is?

15 *MS. STRATTON:* Well --

16 *THE COURT:* It's next to Lake Livingston.

17 *MS. STRATTON:* -- it's north of here. I will not
18 pretend to be from Texas. So, I'm not. I'm from Arizona. I
19 moved here 15 years ago. I most certainly do not know where
20 all of the cities in this state are.

21 *THE COURT:* Ms. Stratton, Sam Houston, Stephen Austin,
22 Milam, Travis, Bowie, none of them was from Texas.

23 *MS. STRATTON:* Then I'm in good company.

24 *THE COURT:* That's right. We're all immigrants. My
25 mother was from Memphis. My dad was from Spokane. I happen to

1 be born here because I needed to be near her at the time.

2 Nobody asked me where she ought to be.

3 *MS. STRATTON:* My children are in the same boat, Your
4 Honor.

5 *THE COURT:* Now you're the one here.

6 *MS. STRATTON:* Yes.

7 *THE COURT:* So I have to talk to you.

8 *MS. STRATTON:* That is perfectly fine.

9 *THE COURT:* There are some things that you can do to
10 help Mr. Whitaker and Mr. Chambers. One is we're now -- when
11 did this thing start?

12 *MS. STRATTON:* September 2013.

13 *THE COURT:* So fixing to be two years. And the
14 caption could be abbreviated to Thomas Whitaker and Perry
15 Williams versus Brad Livingston, et al. Couldn't it? And that
16 would save --

17 *MS. STRATTON:* Oh, you mean when we draft our
18 pleadings? I'm sure. If the Court prefers that, I'm happy to
19 do that.

20 *THE COURT:* No, it's what's done traditionally, which
21 is not always a good idea, but that's a sixth of a page that's
22 just done with an all capital, bold list of a bunch of people,
23 including the unknown people. You understand that this does
24 not address any executioner. If you find an executioner, you
25 must amend your petition with who they are and what they have

1 done. You can't sue unknown people. That's not how it's done.
2 They're unknown, but you can't make them a party.

3 You're probably thinking about Bivens versus five
4 or seven unknown DEA agents. The reason for that was that the
5 United States, with its usual concern for justice, refused to
6 tell Mr. and Ms. Bivens and their children who conducted the
7 raid. But there was actually a historical fact. It was only
8 government malicious obfuscation that kept it from being known.

9 These unknown people have done nothing to
10 anybody. There's no historical fact to be revealed by the
11 State of the Texas, or it would have revealed them. And I
12 think we could generally refer to the defendants as Texas
13 rather than the acronym TIJC, or whatever it is, just as a
14 shorthand. It makes reading -- now, in argument and
15 authorities on the bottom of page 1 of the plaintiffs' motion
16 for discovery, in that paragraph, ma'am, there are five dates
17 in 3 inches, 3 vertical inches, not horizontal inches, and one,
18 two, three -- and three references. It's unreadable. And
19 apparently it's unread, ma'am, because the top of page 2, we
20 have a singular respondent's advisory, and then we have a
21 plural defendants in the next line. Do you see that?

22 *MS. STRATTON:* I do see that, Your Honor. I
23 personally --

24 *THE COURT:* Now, I don't mind if you download the
25 whole thing, but at least it ought to be consistent about who's

1 doing what to whom.

2 *MS. STRATTON:* I agree with you, Your Honor. The
3 defendant --

4 *THE COURT:* Now, don't close the page there.

5 *MS. STRATTON:* Oh.

6 *THE COURT:* Because at the bottom of Paragraph 2,
7 there's one, two, three -- five acronyms in five lines and
8 three or four quotations and two footnotes.

9 Now, I have a docket sheet, so I know when things
10 are filed, and frequently the date things are filed are not
11 important. Is it?

12 *MS. STRATTON:* Not necessarily. But I know that
13 sometimes, because I typically use dates and docket references
14 in my federal court pleadings to help everyone involved in the
15 case understand if they need to go to the docket quickly
16 and they could --

17 *THE COURT:* I understand that, but you then quote
18 my -- you quote their response about what they said about my
19 order.

20 *MS. STRATTON:* Yes.

21 *THE COURT:* I actually used your motion for discovery,
22 I guess it is, yes, as a bad example at a lecture Saturday. I
23 didn't tell them who had done it, because I don't know that you
24 did it. You're just right now personally responsible for it.

25 *MS. STRATTON:* Well, Your Honor, I think I signed it,

1 so I'm responsible for it.

2 *THE COURT:* Everybody signed it though. That's the
3 problem. You're the top one, but like with the Attorney
4 General's Office, that doesn't mean the top name is the
5 responsible name.

6 *MS. STRATTON:* Well, I am the responsible --

7 *THE COURT:* But I pointed out that we're discussing
8 discovery, and it is at the bottom of page 5 when we get
9 Footnote 8 that mentions the poor man's date of execution. And
10 I'm not telling you how to practice, but even though we've been
11 told by the great State of Texas, you tell me not to believe
12 them all the time, but I would start out and say, Thomas
13 Whitaker and Perry Williams, especially Mr. Williams because
14 his execution date has been set for two months from now, need
15 discovery.

16 And there's an interesting term on page 6 in
17 Paragraph 15c. You want documents about the prison's outreach.
18 What exactly is pharmacological outreach?

19 *MS. STRATTON:* Your Honor, I don't think we mean
20 pharmacological outreach. I think what we --

21 *THE COURT:* That's what you're telling them. You want
22 the details about its study of the pharmacology of
23 pentobarbital after its best used by date.

24 *MS. STRATTON:* Yes. That is a good summary of what
25 15c is asking for.

1 *THE COURT:* And has a firing squad been held to be
2 constitutional?

3 *MS. STRATTON:* There is a case that has held a firing
4 squad is constitutional.

5 *THE COURT:* And how about the electric chair?

6 *MS. STRATTON:* Probably. I don't know for sure, but
7 probably, most likely.

8 *THE COURT:* Hanging?

9 *MS. STRATTON:* I do not know.

10 *THE COURT:* Gas chamber?

11 *MS. STRATTON:* Probably.

12 *THE COURT:* In none of the response to my order did
13 anybody suggest to me an answer that would fit into a
14 prescription for a drug. None of them said, Well, the
15 pentobarbital is fine except you need to do this with it. And
16 I got from, I guess, both sides a lot of quotations about the
17 recent case. *Gross*, is it?

18 *MS. STRATTON:* *Glossip*, Your Honor.

19 *MS. SARGENT:* *Glossip*.

20 *MS. STRATTON:* *Glossip v. Gross*, yes.

21 *THE COURT:* Yes. And, no, it didn't hold that this
22 particular form of execution in Texas for these two men is
23 constitutional.

24 *MS. STRATTON:* Correct.

25 *THE COURT:* Well, who thought they did?

1 *MS. STRATTON:* Pardon?

2 *THE COURT:* Who thought that it held anything except
3 for Mr. Gross? The Supreme Court decides cases. It decided
4 the case of whatever that other drug was, and it suggested
5 that -- or it held that there was an available equally good
6 drug, and they said nice things about pentobarbital. Didn't
7 they?

8 *MS. STRATTON:* Yes, that's what the Court held.

9 *THE COURT:* But the Court didn't hold anything about
10 Whitaker, Williams, or Texas in that case.

11 *MS. STRATTON:* It did not, Your Honor.

12 *THE COURT:* It did hold that a different cocktail,
13 which is similar in operation and effect apparently to
14 pentobarbital, was constitutional.

15 *MS. STRATTON:* It held midazolam was constitutional,
16 yes.

17 *THE COURT:* And are you telling me that the Supreme
18 Court in that case held that all of these things you've talked
19 about are required, on page 5, Paragraph 11 of the response to
20 my August 10 inquiry?

21 *MS. STRATTON:* I'm sorry, Your Honor. I didn't follow
22 your whole question.

23 *THE COURT:* All right. Paragraph 11, do you have it?

24 *MS. STRATTON:* Of my motion for discovery or my
25 response?

1 *THE COURT:* No, of the submission in response to the
2 August 10th thing.

3 *MS. STRATTON:* It's in front of me.

4 *THE COURT:* Okay. Is it the petitioner's position
5 that that court held in Oklahoma each of these six bullets are
6 constitutionally required?

7 *MS. STRATTON:* That is not what the court in *Glossip*
8 said. The court in *Glossip* evaluated the district court's
9 ruling for clear error. The district court conducted an
10 evidentiary hearing regarding the -- whether or not the
11 Oklahoma protocol was constitutional. And there was evidence
12 before the Court that evaluated the constitutionality of that,
13 including the availability of known alternative drugs and the
14 U.S. Supreme Court --

15 *THE COURT:* None of that --

16 *MS. STRATTON:* -- entered that ruling by not finding
17 that the court committed clear error.

18 *THE COURT:* They upheld it, ma'am. You can equivocate
19 all you want.

20 *MS. STRATTON:* I'm sorry, Your Honor. I wasn't trying
21 to equivocate. I was trying to --

22 *THE COURT:* But they took 75 pages and lots of dictum.

23 *MS. STRATTON:* Yes.

24 *THE COURT:* But the holding is that constitutionally
25 what Oklahoma intended to do was constitutional.

1 *MS. STRATTON:* Yes.

2 *THE COURT:* And so the standard announced -- or
3 reannounced in that case is the same one that's been around for
4 a while.

5 *MS. STRATTON:* It reaffirmed what was held in *Baze*,
6 yes.

7 *THE COURT:* And that's been the standard. So there's
8 nothing new in that case except the reaffirmation of the rule
9 that they've been applying and the holding that, as done in
10 that instance in Oklahoma, it was constitutional.

11 *MS. STRATTON:* *Baze* was a case decided in 2008.
12 There's been a lot of litigation since 2008, including a couple
13 of court cases before the U.S. Supreme Court. And the
14 petitioners in *Glossip* were trying to distinguish those other
15 cases from *Baze*, and they did not win.

16 *THE COURT:* Ma'am, as long as there's a death penalty,
17 there's going to be litigation.

18 *MS. STRATTON:* That is probably true, Your Honor.

19 *THE COURT:* This is not about the United States
20 Constitution. It's about opposition as a political -- and I
21 don't say that derogatorily, but as a political matter to the
22 policy choice of having it.

23 *MS. STRATTON:* For some people, that is true. Not for
24 me, but for some people.

25 *THE COURT:* Well, if Texas returned to hanging, there

1 would be a lawsuit on every capital case.

2 *MS. STRATTON:* If Texas did what, I'm sorry?

3 *THE COURT:* Returned to hanging people.

4 *MS. STRATTON:* Oh, returned to hanging. Probably.

5 *THE COURT:* Have you looked at the cases related to
6 the recent firing squad use?

7 *MS. SARGENT:* I have not, Your Honor, but the Supreme
8 Court discussed in *Glossip* that they have never held a method
9 of execution to be specifically unconstitutional. That would
10 include the firing squad, that would include hanging, the gas
11 chamber, and, of course, lethal injection.

12 *THE COURT:* Did you say electric chair?

13 *MS. SARGENT:* And the electric chair, yes. They've
14 all been upheld repeatedly.

15 *THE COURT:* So what I was hoping for was that the
16 petitioners would say this drug done this way is acceptable.
17 And I understand that counsel probably don't think that's a
18 very good idea because then Texas might just choose the one
19 they picked and they'll have no argument. But as the Court in
20 Washington has said repeatedly, the penalty is constitutional.

21 The first Congress, the people who wrote the
22 Congress, about half of them had been drafters or members of
23 the convention, voted to make counterfeiting a capital offense,
24 in the first Congress, as I recall, and I'm doing this by
25 memory. That's some clear -- if you're an original intent kind

1 of guy, then that might be clear of what they were thinking at
2 the time. But as somebody said, they're evolving social norms.
3 The problem is neither I nor the Supreme Court nor the
4 Constitution reflect evolving social norms. There are all
5 kinds of things that have been abandoned by the states and by
6 the United States that never were the slightest bit
7 unconstitutional. They just were bad policies.

8 This is a bad policy, by political judgment,
9 which has no weight whatsoever anywhere, not even at home. It
10 is the law, and it's constitutional. And the only question
11 here can be, is its application cruel and unusual.

12 *MS. STRATTON:* Yes, Your Honor.

13 *THE COURT:* That's it. And I need Whitaker and
14 Williams to give me something concrete. I've got every phrase,
15 but I don't have anything in particular. Remember, for
16 Mr. Yowell and for these folks to start with, the complaint was
17 that using a compounding pharmacy was in itself a violation of
18 the Constitution because of the monumental risk of danger. Do
19 you remember that?

20 *MS. STRATTON:* I do, Your Honor.

21 *THE COURT:* Were you here?

22 *MS. STRATTON:* I sat right here in this very chair. I
23 was about this pregnant when I said it, and I said it, yes.

24 *THE COURT:* How many did you have that time?

25 *MS. STRATTON:* Fortunately just one. But it made my

1 total three, so...

2 *THE COURT:* So when I'm asked the question how many
3 children I have, I say "three too many."

4 *MS. STRATTON:* I'll keep that in mind.

5 *THE COURT:* So you may feel that way.

6 *MS. STRATTON:* I did yesterday.

7 *THE COURT:* And you'll recall then that the evidence
8 submitted by all three was something about old people getting
9 meningitis after a month in Massachusetts.

10 *MS. STRATTON:* We had a very undeveloped record, Your
11 Honor.

12 *THE COURT:* No, ma'am. That's not about my record.

13 *MS. STRATTON:* We. We, the collective plaintiff we.

14 *THE COURT:* But you offered some -- and I use this
15 word advisedly -- clown, talk about a rest home in
16 Massachusetts and meningitis. It took them more -- well, what
17 is -- it may have said on your chart -- the average length of
18 time from injection to expiration?

19 *MS. STRATTON:* I believe she said minutes, Your Honor.
20 I don't know that she gave a specific time but --

21 *THE COURT:* I'm not sure it's on the chart. But
22 somebody told me once before and I've forgotten it, so I
23 just --

24 *MS. HOWELL:* I don't think it's on the chart.

25 *MS. SARGENT:* Are you talking about the length of time

1 from the injection to the --

2 *THE COURT:* Expiration.

3 *MS. SARGENT:* -- to the time of death?

4 *THE COURT:* Yes.

5 *MS. SARGENT:* On average, we're looking anywhere from
6 10 to 20 minutes, maybe 25 minutes.

7 *THE COURT:* Okay. So nobody is going to catch
8 meningitis in 20 minutes.

9 *MS. STRATTON:* Correct, Your Honor.

10 *THE COURT:* So I've been offered no data which would
11 tell me that pentobarbital that is six months beyond its best
12 use by date has these characteristics and this is the problem
13 it would cause. I just have assertions that it must be
14 absolutely pure. And that's not the test. The test is its
15 operating effectiveness. And effective includes not causing --
16 as I recall, there was also an assertion originally in this
17 case that it could cause convolutions. That's an
18 anticonvulsant. So I don't know how that causes convolutions.
19 I guess too much of anything is bad.

20 *MS. STRATTON:* Your Honor, at the time of that
21 original hearing regarding Michael Yowell, it was within days
22 of the filing of the case. We utilized an affidavit --

23 *THE COURT:* That's neither the State of Texas nor the
24 Court's fault.

25 *MS. STRATTON:* No, not at all. I'm just trying to

1 explain, Your Honor. He's not our retained expert. He's not
2 the person that we retained to --

3 *THE COURT:* No, because I said he couldn't be an
4 expert, because he's not one.

5 *MS. STRATTON:* Well, we took what you said to heart.
6 We didn't even approach him. And we retained someone that we
7 felt had an appropriate background in order to respond to the
8 Court's April order about the compounding process.

9 *THE COURT:* And he did. And I believe they both came
10 to the same -- Fout, is that your guy?

11 *MS. HOWELL:* Yes.

12 *THE COURT:* Ruble and Fout came to the same
13 conclusion, that if the pentobarbital tests correctly after
14 it's made and when it's at the prison, if it passes the quality
15 tests for purity, for antisepticness -- is that what you call
16 it?

17 *MS. SARGENT:* Sterility --

18 *THE COURT:* The sterility.

19 *MS. STRATTON:* Impotency.

20 *THE COURT:* Pardon?

21 *MS. STRATTON:* It's the impotency.

22 *THE COURT:* If it passes the tests, what happened in
23 Minnesota last April when they were making something doesn't
24 matter.

25 *MS. STRATTON:* Except it sits in a refrigerator --

1 *THE COURT:* No, no. Assume that the day of the
2 execution, they test it.

3 *MS. STRATTON:* Oh, the day. Okay.

4 *THE COURT:* Let's start there. Then no complaint.

5 *MS. STRATTON:* We would be hard pressed to find a
6 complaint.

7 *THE COURT:* And so then my question is, you can move
8 back from the execution to the test, to do it 14 days at a time
9 or something. I don't have any scientific data on which --
10 that both reports were very densely typed and since they
11 were -- I believe they had more citations than you-all did. So
12 that is both of you.

13 *MS. STRATTON:* I'm sure that ours did.

14 *THE COURT:* I think you probably won, but it was
15 close.

16 *MS. STRATTON:* But I -- and you should have seen the
17 original draft, Your Honor. It was much more dense than that.

18 *THE COURT:* But it talks about things that can go
19 wrong.

20 *MS. STRATTON:* Yes.

21 *THE COURT:* But there's no talk about if it's
22 refrigerated for six months, what is the probability of each of
23 those things going wrong. I mean, that's like saying -- by the
24 way, I dissent from -- only mildly from Whitaker and Williams
25 saying this, but the Supreme Court didn't really mean it when

1 they said I didn't know enough science to evaluate this stuff.
2 That hurt my feelings. Now, if they're talking about Judge
3 Hittner, that would be different. And he's a friend of mine.
4 I just use him to better my jokes, because he's available.

5 I need something from Ruble that addresses the --
6 my problem is if the sterility has dropped to a dangerously low
7 level, is it dangerous for pain? I think if you're injected
8 with dirty pentobarbital, the effect would be the same. And
9 I'm not suggesting that you should do that.

10 And, Ms. Sargent, what -- if the doctors say that
11 an ounce is a fatal dose, how many ounces do you give them?

12 *MS. SARGENT:* I'm not sure what the conversion is, but
13 we give 5 grams. Five grams.

14 *THE COURT:* Five grams?

15 *MS. SARGENT:* Five grams of pentobarbital. That's per
16 our protocol.

17 *THE COURT:* All right. Now, how many grams would be
18 fatal?

19 *MS. SARGENT:* Two is normally fatal, but so 5 is
20 overwhelmingly fatal.

21 *THE COURT:* No, I assumed that there was a --

22 *MS. SARGENT:* Yeah.

23 *THE COURT:* -- I hate to call it this, but a margin of
24 safety -- a margin of death.

25 *MS. SARGENT:* Yes.

1 *THE COURT:* And so if it were impotent by 50 percent,
2 it still has a 25 percent margin of death?

3 *MS. STRATTON:* I don't know if that's a realistic
4 calculation. I would have to ask Mr. Ruble.

5 *THE COURT:* Well, I'm assuming that. I mean, it has
6 to be, right? If it's half the --

7 *MS. STRATTON:* I would presume based on math, you
8 could do that kind of calculation, but, you know, I don't know.

9 *THE COURT:* All right. But if it is half as potent as
10 they intended, it's still more than potent enough to kill you.
11 So assuming that's true, there's still no pain involved.
12 Right?

13 *MS. STRATTON:* That would be for Dr. Ruble to tell me.

14 *THE COURT:* Logic --

15 *MS. STRATTON:* I don't --

16 *THE COURT:* See, the reason we have nonexpert judges
17 is because common sense is really important. And it simply
18 cannot be -- in some, the potency, you know, a little water or
19 something or deterioration -- and it could be that some drugs
20 deteriorate so that they're impotent rather quickly. But Ruble
21 didn't tell us about any -- I don't know what the -- we never
22 looked it up, transmutation that occurs. Some things just --
23 you know, like radioactive things, they decay and they
24 substantively change spontaneously as opposed to just weaken in
25 the state that they just start in. Those are two kinds of

1 potency problems. Nobody tells me which one are we talking
2 about.

3 And the same way with sterility. The problem
4 with sterility is, you get secondary infections. It seems to
5 me that that's irrelevant for somebody with a life expectancy
6 of 20 minutes. And I didn't list all of the other things.

7 *MS. STRATTON:* Your Honor, I am sure -- most likely
8 sure, that that is something that Dr. Ruble could opine about.

9 *THE COURT:* Can he do it briefly?

10 *MS. STRATTON:* I've heard you loud and clear, Your
11 Honor, and asking Dr. Ruble to be more brief will be one of my
12 next conversations with him.

13 *THE COURT:* And have him send you --

14 *MS. STRATTON:* But when he submitted his affidavit --
15 I'm sorry.

16 *THE COURT:* Have him send you his report in an
17 editable file, so you can raise the font size to 6 or
18 something. I mean, don't laugh. Your guy is just about as
19 bad. So, you know, I am willing to read the record. It's just
20 my eyes shouldn't bleed.

21 *MS. STRATTON:* Fair enough, Your Honor. We tried to
22 keep what Dr. Ruble provided in that report to be a very
23 concise response. I say "concise" with air quotes, but a very
24 specific response to the Court's question about the compounding
25 process. He could have said a lot more about compounded drugs

1 in general, but we tried to keep him very focused on what
2 you're asking.

3 *THE COURT:* All right. But he didn't say there's
4 anything wrong with compounded drugs.

5 *MS. STRATTON:* Pardon?

6 *THE COURT:* He didn't say there's anything wrong with
7 compounded drugs. He said you can have the problems in the
8 compounding, the same problems you have in manufacturing them.
9 And if he thinks that it's persuasive and say the FDA is more
10 intrusive than a manufacturing and a compounding place, he
11 hasn't had much experience with the FDA.

12 *MS. STRATTON:* I don't know if he said that, Your
13 Honor.

14 *THE COURT:* But there were lots of citations to FDA
15 rules that apply to manufacturers that don't apply. But both
16 of them have agreed, after whatever they do, if it tests pure,
17 it's okay. So the request for every vendor they've ever looked
18 at or talked to is malicious. Because what happened when I
19 gave you with Yowell the name of the laboratory, he gets death
20 threats from these sensitive, warm feeling people.

21 And the reason Oklahoma is using that drug is
22 because they were using pentobarbital and the harassment of
23 those suppliers caused them to quit being willing to supply. I
24 suspect the reason for the name on the purchase order is the
25 Huntsville Unit Hospital is to stop snoops from attacking

1 whoever sells it to them. They had the license. I don't care
2 when it went out. It's no different than saying, Well, they
3 ordered it in the name of Baylor Katy and the license is in
4 Baylor. It's all the same thing. But that's just -- it has
5 nothing to do with the actual purity of the drugs, which are
6 verified by an independent laboratory.

7 *MS. STRATTON:* On a date certain.

8 *THE COURT:* Pardon?

9 *MS. STRATTON:* On a date certain. And then they're
10 used for months after that time period.

11 *THE COURT:* All right. Ms. Howell, don't look scared.

12 *MS. HOWELL:* I'm not scared.

13 *THE COURT:* Oh, yes, you are. You should be.

14 Do you know when the last time Texas proposes to
15 test Mr. Williams's dose?

16 *MS. HOWELL:* Mr. Williams's dose was tested, I
17 believe, in April, Your Honor.

18 *THE COURT:* Okay. Does it propose not to test it
19 between now and September 29th?

20 *MS. HOWELL:* That is our proposition, to not test it
21 between now and September 29th.

22 *THE COURT:* Why don't you test it again?

23 *MS. HOWELL:* It consumes the sample to do so. It
24 consumes enough of the sample to make a difference in the
25 application of the dose.

1 *THE COURT:* All right. That's why it's important to
2 know that despite the best used by data, or whatever that is
3 and all that, I need to know what happens in the first, second,
4 third, fourth, fifth, sixth, seventh, eighth month after the
5 tests, precisely.

6 *MS. STRATTON:* Okay.

7 *THE COURT:* And Ruble is bound to know that or have
8 access to that information.

9 *MS. STRATTON:* If it exists, he would know.

10 *THE COURT:* And, again, this is not a therapeutic
11 dose. So you don't want people using pills and thinking
12 they're getting a hundred milligrams of help when they're only
13 getting 75.

14 *MS. STRATTON:* The only caveat from my previous
15 conversations with him was that the testing is not done for
16 purposes of lethal injection. The testing on the drugs is not
17 done for that purpose, and so there's a fair amount of
18 speculation as to what would happen.

19 *THE COURT:* Well, wait. You mean they test less for
20 therapeutic use than they do for fatal use?

21 *MS. STRATTON:* Well, my point is they don't test for
22 fatal use, and so you're applying --

23 *THE COURT:* Well, but fatal use --

24 *MS. STRATTON:* -- that's for therapeutic use to
25 another process, and I don't know if he'll opine that that

1 makes a difference or not. I just know it's a conversation
2 I've had with him.

3 *THE COURT:* All right. All of the studies that have
4 been done on therapeutic use will have information about what
5 too much is.

6 *MS. STRATTON:* I believe that's true, Your Honor.

7 *THE COURT:* And I doubt that any of them will have,
8 well, if you leave it around, it takes twice as much to be too
9 much. But somehow Texas thinks that 1 gram is a fatal dose.
10 Isn't that what you told me?

11 *MS. SARGENT:* Two grams.

12 *THE COURT:* Two grams. So whatever the data on
13 therapeutic is, all the upper limits described in the
14 literature would inform a judgment about fatality. And would
15 you tell her later what your foot note for 2 grams is. That
16 is --

17 *MS. SARGENT:* Yes, Your Honor.

18 *THE COURT:* -- the source of that datum. So, but the
19 testing is as to purity, sterility, and he listed several other
20 things. And I don't know what "indicators of subpar or
21 otherwise problematic drugs" means. That's a phrase in here.
22 And that's my problem. I get a substantial volume of
23 abstractions. And the State, I think, has staked out a fairly
24 narrow position, and that is, we did it and it's pure and we
25 use it within whatever the period is. In this case it will be,

1 what, six months, eight?

2 *MS. STRATTON:* Well, that's part of my issue, Your
3 Honor.

4 *THE COURT:* Well, wait a minute.

5 *MS. STRATTON:* Okay.

6 *THE COURT:* So for this, it was late April. Wasn't
7 it? April 28th?

8 *MS. SARGENT:* Five months.

9 *THE COURT:* So, five months. So, Mr. Williams needs
10 to know what happens to pentobarbital in -- I recall data on
11 its refrigeration. Is that accurate?

12 *MS. SARGENT:* As long as it's tested for sterility.
13 It can be stored up to 45 days. Is that refrigerated?

14 *THE COURT:* Yes, that --

15 *MS. HOWELL:* As long as it's tested for sterility,
16 it's up to the professional judgment of the pharmacist as to
17 what the beyond use date should be according to --

18 *THE COURT:* Wait a minute. Speak up. I can't --

19 *MS. HOWELL:* Sorry. If the sample has been tested for
20 sterility, it's up to the pharmacist, based on his professional
21 judgment and experience, to determine the appropriate beyond
22 use date. It is not limited to 45 days. It's not limited to 3
23 days or whatever the -- any other days.

24 *THE COURT:* All right.

25 *MS. SARGENT:* That's something their own expert opined

1 about.

2 *THE COURT:* Would he say the same thing?

3 *MS. SARGENT:* That's exactly what he said. He
4 conceded that a beyond use date is based on the judgment -- the
5 professional judgment of the pharmacist who makes the drug.

6 *THE COURT:* And that --

7 *MS. STRATTON:* And depending on how it's stored.

8 *THE COURT:* Well, that's -- I mean, it could be stored
9 in the sunlight. I mean, there are probably lots of things you
10 could do to it. But there's no evidence they're doing anything
11 other than whatever they say they're doing, which is -- and at
12 what temperature is it refrigerated? 38?

13 *MS. HOWELL:* I do not know off the top of my head,
14 Your Honor.

15 *THE COURT:* It's in this, wasn't it?

16 Now, both technicians say that the quality of the
17 active ingredient is pivotal to the quality of the final
18 product with the -- one of them, though, goes on to say that
19 all this talk about the things with which it is mixed. Do we
20 know what Texas used to make it fluid -- that the pharmacy did?
21 It's water plus something.

22 *MS. HOWELL:* There's no evidence of that, Your Honor.
23 We don't know.

24 *THE COURT:* Okay. Propylene glycol, alcohol,
25 hydrochloric acid, sodium hydroxide to make it -- I don't know

1 what tonicity is, and I didn't have time to look it up. Does
2 anybody know what "tonicity" is?

3 *MS. STRATTON:* No, Your Honor.

4 *THE COURT:* And pH is -- I assume to have a neutral
5 pH, so it's either acidic or basic. And solubility we know,
6 that's easy.

7 Do you know what he meant at the bottom of page 4
8 where he talked about quality improvement? It's the last --

9 *MS. STRATTON:* Of Dr. Ruble's report?

10 *THE COURT:* Yes, ma'am. Last line on page 4.

11 *MS. STRATTON:* Last line on what page?

12 *THE COURT:* Four.

13 *MS. STRATTON:* Four. Oh, I'm sorry, that's his CV.

14 *THE COURT:* Do see it?

15 *MS. STRATTON:* Quality improvement?

16 *THE COURT:* Quality improvement.

17 *MS. STRATTON:* I think he's just describing the
18 quality programs that --

19 *THE COURT:* I know, but what does --

20 *MS. STRATTON:* -- compounding -- oh, you mean because
21 he doesn't define it or describe it --

22 *THE COURT:* Well, he lists things like quality
23 assurance and quality control. And that's two things. Testing
24 and good ingredients to start with. Then he has quality
25 improvement within the same parentheses, and I have no idea

1 what that means.

2 *MS. STRATTON:* I would imagine that he means how to
3 improve, by using the same word, the quality process they
4 already have in place, if there's ways to make it better.

5 *THE COURT:* Now, that doesn't affect any particular
6 drug though. So we're talking about something that's made.
7 It's made one way. The idea that you can make it a different
8 way and be more efficient would be irrelevant to our problem.

9 *MS. STRATTON:* Potentially. But I think he's just
10 trying to talk about the compounding process in general, what
11 pharmacies should be doing.

12 *THE COURT:* Do you understand that most old-fashioned
13 pharmacies, and I use one, so I don't know about modern chains
14 as much, compound drugs there in the store?

15 *MS. STRATTON:* Yes, like I use it for my children.

16 *THE COURT:* Where you get a compounded drug?

17 *MS. STRATTON:* A lot of drugs that -- like babies
18 take, those are compounded in the pharmacy to put them in
19 liquid form because kids can't take a pill.

20 *THE COURT:* Well, maybe healthy young people like you
21 don't use drugs. Babies and I use drugs that apparently nobody
22 else uses, so they make it up.

23 And the Table 1 on the bottom of page 6 is fine.
24 It just doesn't tell us what we need to know, which is --

25 *MS. STRATTON:* What happens after this --

1 *THE COURT:* Yeah, overnight they don't just blow up.

2 All right. And, ma'am, on the advisory about the
3 execution date, I haven't had as much experience with Howell
4 and Sargent as I have with other people, but I believe I can
5 accurately recount to you that any time the State of Texas
6 thought it was putting a lot of pressure on me, turned out to
7 be sadly mistaken. They have a job to do --

8 *MS. STRATTON:* Yes, sir.

9 *THE COURT:* -- and I'm going to do my job. But them
10 deciding when to do their job -- remember this whole problem
11 came about because I decided it wasn't ripe and therefore
12 didn't apply the whole analysis that I did to Yowell. It turns
13 out if I just decided an unripe case, apparently it would have
14 been fine, but -- so it wasn't ripe and then there -- and the
15 holding is, it wasn't ripe, and then there was a lot of talk
16 about other stuff. But the holding was that the case was ripe.

17 *MS. STRATTON:* Yes, sir.

18 *THE COURT:* What difference does it make what county
19 Whitaker and Williams came from or how many other people from
20 Harris County are up there?

21 *MS. STRATTON:* What I understand of the process, Your
22 Honor, that I've learned from others, is that the State
23 typically chooses people that have been through their habeas
24 proceeding the longest to set their date of execution. There
25 are a number of -- I believe 12 or 14 was the number that was

1 given me. We did not list their names in here intentionally.

2 *THE COURT:* I don't want --

3 *MS. STRATTON:* But those are people that have been
4 through their habeas proceeding longer than Mr. Williams had
5 and --

6 *THE COURT:* Well, only because it ended up getting
7 stayed in the first place.

8 *MS. STRATTON:* I don't know what those presumptions
9 are, Your Honor.

10 *THE COURT:* Well, we did Yowell a year and a half ago,
11 two years ago, didn't we?

12 *MS. STRATTON:* Yes, in September of 2013.

13 *THE COURT:* So it's not a rush. Whatever it is doing,
14 that's not a rush.

15 *MS. STRATTON:* You mean what the State is doing?

16 *THE COURT:* Yes, ma'am.

17 *MS. STRATTON:* Oh, I don't have in front of me the
18 date that Mr. Williams completed his habeas proceeding.

19 *THE COURT:* Ma'am, I don't care. The State of Texas
20 can take them in any order it wants to.

21 *MS. SARGENT:* It's the decision of the trial judge and
22 the District Attorney's Office to set the dates. It is their
23 strict prerogative under the Court of Criminal -- under the
24 Code of Criminal Procedure. So --

25 *THE COURT:* But the district judge has to sign the --

1 *MS. SARGENT:* He signs the order, yes. But he is the
2 one who has the exclusive province to choose the date. Often
3 there is input, yes, from the District Attorney's Office, but
4 they choose the dates when they want to choose them. And, yes,
5 most of them wait until the federal habeas proceedings are
6 concluded, but the number of months or years that a county
7 waits is dependent on perhaps a lot of factors.

8 *THE COURT:* Does the State tell the district attorney
9 when it's busy and when it has an opening?

10 *MS. SARGENT:* No.

11 *THE COURT:* All right. So, if Harris County signed 18
12 orders for the execution and the sheriff served the writs, you
13 would do all 18 of them the same day?

14 *MS. SARGENT:* No, absolutely not, Your Honor. There
15 is --

16 *THE COURT:* Well, what are you going to do? Disobey
17 the order?

18 *MS. SARGENT:* There is some -- well, in those cases,
19 due to the pressure that it would put on the prison system,
20 we've been through this before, if one county already has a
21 date and another county comes in and sets the date without
22 knowing about the first date, that date will be modified or
23 withdrawn and reset.

24 *THE COURT:* You hope.

25 *MS. SARGENT:* TDCJ, to my knowledge, has never carried

1 out two executions in the same night.

2 *THE COURT:* I know, but somebody has to ask the court
3 to modify their order.

4 *MS. SARGENT:* Yes.

5 *THE COURT:* You can't just --

6 *MS. SARGENT:* And oftentimes the prosecutor will go to
7 the Court in those instances and ask for a modification.

8 *THE COURT:* But it's not -- I mean, obviously Dallas,
9 Harris, and Bexar County produce the greatest number of
10 candidates, right?

11 *MS. SARGENT:* Yes.

12 *THE COURT:* I mean, Loving County only has 18 people
13 in it. So it's probably not a large consumer of your
14 resources. So you don't do it just because it's a new county,
15 do you? So if Colorado County, peace-loving county, ended up
16 having one, they wouldn't take precedence over everybody else?

17 *MS. SARGENT:* No.

18 *THE COURT:* Okay. You hope.

19 *MS. SARGENT:* I hope. But no one county takes
20 precedence over any other county, big or small. It's --

21 *THE COURT:* Well, if a Colorado County district judge
22 signs the order --

23 *MS. SARGENT:* If he signs the order first, then his
24 date is first. He gets the priority. If Harris County wants
25 to come in and sign an execution order for that same date,

1 Colorado County would have priority.

2 *THE COURT:* Okay. And, ma'am, the last line of that,
3 "All in contravention of the clear preferences of the Court of
4 Appeals for the Fifth Circuit," they held the case was ripe.
5 Yes, there's a lot of dictum in there. I even understood the
6 dictum, but courts don't work by preferences. They work by
7 holdings in cases affecting two people.

8 *MS. STRATTON:* Your Honor, one of the issues that the
9 judges on the panel asked me during oral argument was about the
10 posturing of the case, meaning through an injunction proceeding
11 versus through after a trial on the merits, and that was the
12 purpose of that statement in the advisory, was that by having
13 set Mr. Williams for execution, the Court -- the State is
14 forcing our hands to potentially put this in an injunctive
15 posture versus a more traditional trial on the merits posture,
16 which --

17 *THE COURT:* No, you don't have to do that. You have
18 to move to stay it. It's related to this case. I have an
19 active case.

20 *MS. STRATTON:* Then I make an oral motion to stay the
21 execution of Perry Williams.

22 *THE COURT:* Well, but I asked for a description of an
23 alternative, and I got no answer to that, other than a
24 recitation of all the other mumbo jumbo about we have to see
25 whether the room was clean when the water was bottled to be

1 used medicinally and things like that. I got a checklist of
2 details. And so as near as I can tell, the pentobarbital is
3 fine. The only question that Williams has, is how frequently
4 is it tested. But before I'm going to make the State buy twice
5 as much pentobarbital, I need Mr. Ruble to actually answer the
6 question, which is what does four -- five months did you end up
7 calculating?

8 *MS. SARGENT:* Yes, five months.

9 *THE COURT:* What does a five month from testing, held
10 under the conditions that Texas uses, what is the quality,
11 sterility -- we don't have to worry about -- well, I guess
12 viscosity, the things both of them listed. What is the effect
13 of the passage of five months on -- and I don't want to know it
14 makes it all terrible. I want to know that -- and I don't
15 think, but I'm happy to hear what he has to say, that sterility
16 is the question here. Now, it could be so horribly unsterile
17 at this point that it interferes with the drug, but I don't
18 understand that to be the purpose of the sterility test, but I
19 could be wrong. Let him explain it.

20 But basically we're talking about potency. And
21 then he has to explain why a dose, when in a quarter times, if
22 I did the math right, the lethal dosage would not account for
23 and overcome a 23 percent loss of potency. Do you understand?

24 *MS. STRATTON:* Yes.

25 *THE COURT:* I mean, that's what I've been asking for.

1 I want specific scientific data that make the arguments make
2 sense, since they both --

3 *MS. STRATTON:* I don't know Mr. Ruble's answer to that
4 question off the top of my head.

5 *THE COURT:* Well, no --

6 *MS. STRATTON:* He may have provided it to us already.
7 And if he did provide it to us and did not include it in his
8 report, then I probably advised him to not put it in there,
9 because we were trying to specifically respond to your order.

10 *THE COURT:* All right. But that's what I need to
11 know.

12 *MS. STRATTON:* Okay.

13 *THE COURT:* If it is five months out of date and
14 there's this much of it, what would be the potency, sterility,
15 and other things. Because if it's clear that the deterioration
16 rate -- and, again, we're, talking about lethal use and not
17 therapeutic use.

18 *MS. STRATTON:* Right.

19 *THE COURT:* And with therapeutic use, they usually
20 don't give you twice as much as you need and you usually have a
21 life expectancy somewhat longer, but -- and this is a
22 hypothetical question: But does the protocol in use by Texas
23 include a backup injection?

24 *MS. SARGENT:* A backup injection? Yes.

25 *THE COURT:* And what is it?

1 *MS. SARGENT:* It's another 5 grams of pentobarbital.

2 *THE COURT:* So more of the same?

3 *MS. SARGENT:* Yes.

4 *THE COURT:* So for all practical purposes, it's
5 pentobarbital and water?

6 *MS. SARGENT:* I assume so.

7 *THE COURT:* Because the other stuff has to be very
8 trace. Would you please find out what are the -- water for
9 solubility, but those other additives that everybody talked
10 about to maintain a neutral acidity and diacid -- it's in the
11 report.

12 *MS. SARGENT:* Yeah, we talk about propylene glycol and
13 some other things.

14 *THE COURT:* That's for liquidity, I think, but just
15 get the ingredients that are used to liquefy the pentobarbital.

16 *MS. SARGENT:* Okay.

17 *THE COURT:* It's his report.

18 *(Judge conferring with law clerk.)*

19 *THE COURT:* I thought I marked it. Propylene glycol,
20 alcohol, hydrochloric acid, sodium hydroxide. And I'll just
21 look up tonicity myself.

22 You might ask Dr. Ruble whether the standards he
23 insists apply to this complicated process obtain in pharmacies,
24 regular retail pharmacies.

25 *MS. STRATTON:* Whether the standards apply to retail

1 pharmacies?

2 *THE COURT:* Well, whether they actually exist in them.
3 Do retail pharmacies compound drugs for therapeutic purposes
4 with laminar flow workbenches and all the other requirements
5 that he insists that the State should make sure everybody does.

6 *MS. STRATTON:* I'll ask him, Your Honor.

7 *THE COURT:* Pardon?

8 *MS. STRATTON:* I'll ask him. I believe that there's
9 another set of provisions required for retail pharmacies, but
10 I'll confirm with Mr. Ruble.

11 *THE COURT:* Well, there are lots of footnotes to those
12 requirements. I didn't look to see where they came from. But
13 as I understand it, the director of the Texas prisons has the
14 authority to change the means of execution; is that right?

15 *MS. SARGENT:* Yes, so long as it remains within State
16 law, which is lethal injection.

17 *THE COURT:* All right. Well, that narrows it down. I
18 didn't -- there's a whole range of things.

19 *MS. SARGENT:* Yes. But currently our protocol has no
20 alternative options.

21 *THE COURT:* I was thinking maybe he was a Comanche,
22 and he was going to tie him between two horses and things like
23 that.

24 *MS. SARGENT:* No, sir.

25 *THE COURT:* All right. Will Texas kindly commit to

1 the Court that there will be no change in the protocol for
2 Williams that has been furnished to Ms. Stratton?

3 *MS. SARGENT:* As long as it takes place on its
4 scheduled date of September 29th.

5 *THE COURT:* No, I don't mean forever, but --

6 *MS. SARGENT:* Yeah.

7 *THE COURT:* Is that enough?

8 *MS. STRATTON:* For Mr. Williams, that satisfies his
9 due process claim, with the exception of whether or not his
10 Eighth Amendment claim can be prosecuted within the timeline
11 between now and September 29th.

12 *THE COURT:* His which amendment?

13 *MS. STRATTON:* His Eighth Amendment claim.

14 *THE COURT:* All right. That's all I'm worried about.
15 But I don't want to make you answer a bunch of questions about
16 pentobarbital and discover that they're going to use rancid
17 grapefruit juice.

18 *MS. STRATTON:* Understood.

19 *THE COURT:* You know, I want a stationary target. And
20 then I want your people to get specific. I've had all of the
21 abstractions and three levels of synonyms. That won't help me.
22 We're talking about a very specific concrete event, not the
23 process of compounding pharmacies in the world. He told me a
24 lot about compounding, nothing that I didn't much already know,
25 except all the citations. He only indicated that there could

1 be all these problems, but he gave me no dimension of the
2 problem.

3 *MS. STRATTON:* I understand where you're coming from,
4 Your Honor, I do.

5 *THE COURT:* He had a, what, five column by four row
6 chart that explained all those dates and temperatures and
7 things and then in the text that either precedes it or follows
8 it, he said, of course, the best use date is the pharmacist's
9 professional decision, which wipes out the specificity of the
10 chart.

11 *MS. STRATTON:* But one of the issues that we've
12 learned, Your Honor, begs the question of the pharmacist's
13 decision, because we've -- not us personally, but through
14 public information reports, other death sentence inmates have
15 learned that the same set of drugs that will be used
16 purportedly to execute Mr. Yowell -- I'm sorry, Mr. Williams,
17 got myself off by a couple years, will -- the beyond use date
18 has changed from one date to a date eight months longer, and I
19 don't understand why that -- how that's possible.

20 *THE COURT:* I read that. It doesn't matter at least
21 until Dr. Ruble tells me what difference five versus one and a
22 half makes.

23 *MS. STRATTON:* Okay. Understood.

24 *THE COURT:* I mean, that's the problem.

25 *MS. SARGENT:* Your Honor, if I may --

1 *THE COURT:* It's not --

2 *MS. SARGENT:* -- the last execution that Texas carried
3 out on August 12th was done with the same batch of
4 pentobarbital that will be used to execute Mr. Williams on
5 September 29th, and there were absolutely no problems. It went
6 off as every other execution has gone off in the last three
7 years.

8 *THE COURT:* And how long was his treatment time?

9 *MS. SARGENT:* 15 minutes.

10 *THE COURT:* Is that on your chart?

11 *MS. SARGENT:* It's on the chart that was attached to
12 Exhibit A of our discovery -- opposition to their discovery
13 request.

14 *THE COURT:* Ms. Stratton, would you like for me to
15 have Whitaker and Williams here at the next conference?

16 *MS. STRATTON:* That's up to you, Your Honor.

17 *THE COURT:* Well, do you want --

18 *MS. STRATTON:* I mean, I'm sure they wouldn't mind
19 getting out of jail for a day, but, I mean, I don't know that
20 it's necessary to answer your questions, but if you would like
21 them here, then that's fine.

22 *THE COURT:* Well, I'm concerned that they're not -- I
23 understand that, you know, they're convicted murderers, and I
24 don't remember anything about their background. I think
25 somebody owes them the courtesy of talking to them. Lawyers

1 can visit death row people, right?

2 *MS. SARGENT:* Absolutely, all the time.

3 *THE COURT:* Now, the State doesn't want me to bring
4 them.

5 *MS. SARGENT:* Your Honor, we have no position on that.
6 If you would like to have them present, that's totally fine.

7 *THE COURT:* I was instrumental in helping us get the
8 Spears hearings so you didn't have to bring -- at odd occasions
9 have prisoners brought down.

10 *MS. SARGENT:* Sure.

11 *THE COURT:* And we just -- and I went to the prison
12 with the marshal and the court reporter and the law clerk. We
13 had the unit warden, the unit doctor, and some other
14 administrative person.

15 *MS. HOWELL:* Usually the grievance coordinator, Your
16 Honor. I was there with you.

17 *THE COURT:* You don't look that old. But
18 jurisprudence has cut the volume of those substantially. So I
19 haven't been in probably ten years. I'm perfectly willing. I
20 thought it was a great program. Most of them could be solved
21 with just a friendly conversation with the guy.

22 And my favorite one was when this guy's complaint
23 was that a guard had come into his cell and he had -- the
24 prisoner had drawn satanic symbols on his laundry bag and two
25 pillow cases. And the guard expressed some Christian

1 disapproval of satanic symbols and shredded them. And so I
2 said, "Well, what's a laundry bag go for?" And he said,
3 "3.50." "And a pillow case at the commissary?" "\$2." So I
4 turned to the warden and said, "Give the man \$7 for two pillow
5 cases and a laundry bag." And probably Ms. Howell, she was a
6 lot younger then, jumped up and said, "We object. We refuse to
7 settle cases like this. We're not settling anything." And I
8 said, "Lady, your gasoline coming to Huntsville from Austin is
9 more than settling this case." And she started talk again and
10 the warden said, "Shut up." It just -- and a lot of them, you
11 just chat with them a minute, and they say, "I was mad back
12 then, but it's no big thing," and it would go away. It is a
13 lot more efficient than having law clerks do those all the
14 time.

15 So after you talk to Dr. Ruble about something
16 that will pass the *Daubert* test by testimony -- just saying
17 things can go wrong, we're all going to die, will not allow him
18 either to testify at all or persuade me. But after that, how
19 many days do you think it would take to discuss with, as near
20 as I can tell, Ruble and Fout?

21 *MS. STRATTON:* If I can reach him today, I'll reach
22 him today. He's in Utah.

23 *(Judge conferring with case manager.)*

24 *THE COURT:* Three minutes.

25 *(Recess from 3:29 p.m. to 3:32 p.m.)*

1 *THE COURT:* Thank you. Be seated.

2 All right. Did I leave you all with a question
3 on the floor?

4 *MS. STRATTON:* You did, and I have to recall, Your
5 Honor, I don't know what it was. I was in the middle of
6 answering it, I think.

7 *THE COURT:* All right. Well, I'll take that as a good
8 answer and we'll move on. All right.

9 Oh, I know what it was. How long do you suspect
10 it will take --

11 *MS. STRATTON:* Oh, yes.

12 *THE COURT:* -- to discuss the intricacies of
13 pentobarbital? I'm not going to listen to Fout or Ruble make
14 speeches about anything. But in your case Ruble will have to
15 answer direct questions about science and stuff, not the kind
16 of stuff he's been giving us. I mean, it's about his
17 background, but that doesn't answer the question.

18 And similarly, Fout is going to have to answer
19 direct questions from you-all and gracefully prepared cross
20 questions from her, and both of them will have to take cranky
21 cross questions from me. Have we got the process down? Are
22 there any other witnesses you can think of besides the two of
23 them?

24 *MS. SARGENT:* Does that mean we're going -- are we
25 talking about a hearing, or are we talking -- I'm sorry, Your

1 Honor.

2 *THE COURT:* Well, we're talking about having a factual
3 determination like Williams wants before he dies.

4 So, Ms. Stratton, who besides the two technicians
5 do you think have something usefully cogent and precise that we
6 should hear from?

7 *MS. STRATTON:* I think the State should bring a
8 corporate representative for better purposes.

9 *MS. SARGENT:* A corporate representative from who?

10 *MS. STRATTON:* The TDCJ.

11 *THE COURT:* About what? What do you ask of them?

12 *MS. STRATTON:* Well, I would like to be able to apply
13 what Dr. Ruble has to -- you know, his opinions about the
14 facts --

15 *THE COURT:* We're going to give you some data, but
16 we're not -- I don't care what Deputy Zarina of something there
17 thinks about stuff. I'm not applying its policy or Williams'
18 policy. I'm applying the law to a process that we're going to
19 define to see whether it's unreasonably cruel. Right?

20 *MS. STRATTON:* Understood, Your Honor. But I think
21 that there are facts that we don't know.

22 *THE COURT:* Name the fact.

23 *MS. STRATTON:* I mean, I think I've listed them in
24 Paragraph 15 of our motion for discovery. I mean, there are
25 things about how the State procures the drug.

1 *THE COURT:* No, ma'am. If it tests pure, the
2 antecedent and facilities are irrelevant.

3 *MS. STRATTON:* Okay. I understand what you're saying,
4 Your Honor. I think we're just going to have to agree to
5 disagree, but I understand.

6 *THE COURT:* All right. Well, that's a ruling. Both
7 of the experts have said if it tests pure, that determines its
8 usefulness. Now, they have the same sort of opinions about
9 what's supposed to happen before, but if it's not diseased when
10 the prison gets it, it wasn't diseased in any significant way
11 en route to the prison. He's not going to be hurt by something
12 that happened by the people distilling the alcohol that may be
13 an additive. He's hurt because of the compound that arrives at
14 the prison being injected. So if it's chemically pure, to the
15 extent we know exactly what that means, and sterile and you
16 need -- I don't know whether Ruble can do it, but perhaps he
17 can with his knowledge, that the idea about needing an answer
18 on does sterility matter given the difficult circumstances of
19 its use here.

20 All right. And so I don't know why we need more
21 than two days, do you?

22 *MS. STRATTON:* No, I would be happy for two days, Your
23 Honor.

24 *THE COURT:* All right. Does Texas see why it would
25 take more than two days?

1 *MS. SARGENT:* No, Your Honor.

2 *THE COURT:* All right. Now, I'm not sure I'm going to
3 be able to -- now, I'll try to detail in an order what we've
4 talked about this afternoon, but you've got the gist of it. I
5 need some explanation of exactly how much deterioration and
6 which quality he thinks is important would cause under these
7 uses suffering. So we now know that the backup is the same
8 stuff, from the same batch. So the test of this should be the
9 test of that. Is that all right?

10 *MS. STRATTON:* That's my understanding, yes.

11 *THE COURT:* All right. So right promptly, like 3:00
12 o'clock Thursday, Stratton needs a document that shows what
13 besides pentobarbital and water are components of this batch.
14 The compounding pharmacy clearly will have the record. You can
15 cut their name off of it and have your corporate representative
16 certify in their own blood that that is the record from the
17 compounding pharmacy. I don't want you to identify the
18 pharmacy. Do they already know -- do you know? Ms. Stratton,
19 do you know who's compounding it?

20 *MS. STRATTON:* No, Your Honor. That information has
21 been kept confidential by the State.

22 *THE COURT:* Yes, for reasons of public safety of
23 pharmacists.

24 *MS. STRATTON:* That's the State's position, yes.

25 *THE COURT:* Pardon?

1 *MS. STRATTON:* I said, yes, that's my understanding.

2 *THE COURT:* Yes. And in this case alone we've had
3 evidence that that's not a fictitious use of public safety.

4 *MS. STRATTON:* And, Your Honor, are you asking the
5 State to -- I would assume that Dr. Ruble would need to know
6 more than just what the components are, but the amounts of
7 those components.

8 *THE COURT:* Well, it should be in there.

9 *MS. STRATTON:* I just wanted to clarify.

10 *THE COURT:* I mean, the compounding pharmacy knows
11 what they put in there and how much of it, so --

12 *MS. STRATTON:* And you said by Thursday at 3:00 p.m.?

13 *THE COURT:* Yes. Computers are a wonderful thing.
14 Also, Stratton needs to have the complete protocol from what
15 has been done about Williams and is intended to be. Now, I
16 don't think anything other than the selection of the drug and
17 the date has been done, right?

18 *MS. SARGENT:* Are you --

19 *THE COURT:* Is there anything Williams specific about
20 the proposed execution?

21 *MS. SARGENT:* No. The protocol is the same for each
22 and every execution. So there was a copy of the protocol
23 attached to my opposition to their motion for discovery.

24 *THE COURT:* Okay.

25 *MS. STRATTON:* I have it, Your Honor.

1 *THE COURT:* All right.

2 *MS. STRATTON:* It's the same protocol the State's had
3 in place since 2012.

4 *THE COURT:* Well, it works. And the State has
5 committed not to change the drug or the protocol, right --

6 *MS. HOWELL:* That is correct, Your Honor.

7 *MS. SARGENT:* Yes.

8 *THE COURT:* -- for this date for Mr. Williams.

9 Ms. Stratton, if there's a fact that you or Ruble
10 or anybody else for Mr. Williams needs to know, if you will
11 write in the middle of a piece of paper what the fact is, it
12 can be a question, but it would be what percentage of
13 something -- I don't want to know contention or policy or any
14 of that stuff. But if there is a datum that somebody thinks
15 they need for Mr. Williams, send a nice, neat letter saying,
16 "Would you please send us the attached datum," and send it to
17 them.

18 *MS. STRATTON:* Okay.

19 *THE COURT:* And then -- it's like a request for
20 admissions, but she would take eight pages to put the caption
21 on a request for admission. And then you get to answer and
22 sign it and send it back to her. And you can write it on the
23 same page in your handwriting for all I care, but get her the
24 data. And if you think it's intrusive or emotionally offensive
25 or whatever you think about the data, then send her and my case

1 manager an e-mail that says, "We do not believe that that's a
2 proper inquiry."

3 *MS. SARGENT:* So to a certain extent you're granting
4 their discovery request? Is that what I'm understanding?

5 *THE COURT:* No, I'm not touching that thing.

6 *MS. SARGENT:* Okay.

7 *THE COURT:* It goes on for pages and miles. I'm
8 telling the State what it wants to do.

9 *MS. SARGENT:* Okay.

10 *THE COURT:* And it wants to do it. Is that clear?

11 *MS. SARGENT:* Yes. I just wanted to be clear, Your
12 Honor.

13 *THE COURT:* I'm letting them ask you -- it's a
14 practice I indulged in years ago when I was a lawyer. I would
15 send requests for admissions, but it didn't have a lot of stuff
16 and just said, Charlie, I think this is undisputed. Would your
17 client stipulate that, and then a fact, love, Lynn.

18 *MS. STRATTON:* I understand, Your Honor.

19 *THE COURT:* And so I just want the information to you.
20 And if we need to put red ribbons and gold seals on it in a
21 little while, we will.

22 *MS. STRATTON:* I understand. I believe you've
23 articulated your limitations as to what you're inquiring about,
24 and I will do my best to make sure that the information I ask,
25 if any, is within that framework.

1 *THE COURT:* And it all has to do it promptly. If I'm
2 really confused about what y'all are talking about, I'll get
3 both of you on the phone and have a court reporter there and
4 we'll just have a hearing on discovery. I'm not inviting a
5 lot, but you may stumble across something that we haven't
6 thought of, I can't believe with four of the smartest people in
7 the country, but it could happen.

8 We're going to be able to assure Mr. Williams,
9 through his learned counsel, that the process employed to kill
10 him is not constitutionally cruel, which does not mean it won't
11 bother him or if they have to stab him with a needle three
12 times -- the only person I've ever had that happen was at the
13 U.T. student medical clinic when I was in law school. I
14 finally decided, ma'am, I'll come back or just die. I'm in
15 more danger of dying from the blood withdrawal than I am with
16 whatever it is I have.

17 But the object here is clear and it's narrow.
18 That there's a lot of talk in the case, but it's a very simple
19 transaction. On a day next month, the State wants to kill
20 Mr. Williams. They're going to do it in a way that's being
21 disclosed in advance, so that everybody is assured that it will
22 not be cruel.

23 Anything else we can achieve here?

24 *MS. STRATTON:* Your Honor, do you have a deadline by
25 which I need to have Mr. Ruble answer your questions?

1 *THE COURT:* Pretty quickly, because the trial will be
2 September 9th and 10th.

3 *MS. STRATTON:* 9th and 10th. Okay.

4 *THE COURT:* I can do it almost any weekend.

5 *MS. STRATTON:* Pardon?

6 *THE COURT:* I can do it almost any weekend.

7 *MS. STRATTON:* Well, if that could get me away from my
8 children, I wouldn't complain.

9 *THE COURT:* You know after Hurricane Ike --

10 *MS. STRATTON:* Except they're about to start school,
11 so...

12 *THE COURT:* After Hurricane Ike and our staff were
13 trapped at home with their children for six, eight, ten days,
14 no electricity, they were so happy to have their jobs. They
15 came back with big grins on their face, because they were some
16 place not with their children and no air conditioning.

17 Do you know Judge Lynn in Dallas? Barbara Lynn?

18 *MS. STRATTON:* I have not had any -- only Judge Lynn
19 in bankruptcy court, not the other judge.

20 *THE COURT:* Well, I tried her last case before she
21 ascended over Labor Day weekend. It was, strangely enough, a
22 real emergency copyright case.

23 *MS. SARGENT:* Your Honor, may I interrupt just a
24 moment. Ms. Howell is on a vacation, a preplanned vacation,
25 and will not be available the 9th and 10th. And we are

1 wondering if we could move the hearing to the 14th, the
2 following Monday and Tuesday.

3 *THE COURT:* One of us is working on a very tight
4 schedule.

5 *MS. SARGENT:* I understand that, Your Honor.

6 *THE COURT:* And as much as I would like to have her,
7 Paxton's got a whole building full of people. You need to get
8 one of them and beat some sense into them.

9 *MS. HOWELL:* We'll do that, Your Honor.

10 *THE COURT:* Because I don't want somebody coming down
11 here and acting like they're from the Justice Department of the
12 United States.

13 *MS. HOWELL:* We will avoid that.

14 *THE COURT:* We're from Washington and we're here to
15 tell you hicks what's going on.

16 Ms. Stratton, anything else?

17 *MS. STRATTON:* No.

18 *THE COURT:* Now, I don't invite it, but if you-all
19 should somehow get at cross-purposes, I want to know within 30
20 minutes.

21 *MS. STRATTON:* Fair enough.

22 *THE COURT:* Because we're going to do this. We're
23 going to do it right. But everybody needs to know.

24 *MS. STRATTON:* Understood.

25 *MS. SARGENT:* Yes, Your Honor.

1 *THE COURT:* Unfortunately I usually close my death
2 penalty opinions with a quote from Tom Clark in the Greenberg
3 spy case. Our burden is heavy, but our duty is clear. I'm
4 going to do my duty as soon as I can see it.

5 All right. Anything else?

6 *MS. STRATTON:* Nothing from me, Your Honor.

7 *MS. SARGENT:* No, Your Honor.

8 *(Concluded at 3:58 p.m.)*

9 * * *

10 I certify that the foregoing is a correct transcript from the
11 record of proceedings in the above-entitled cause, to the best
12 of my ability.

13
14 /s/ Kathy L. Metzger
15 Kathy L. Metzger
16 Official Court Reporter

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25 8-27-2015
Date